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Notes and Comments

EXPLOITING THE AMERICAN FLAG: CAN THE LAW DISTINGUISH CRIMINAL FROM PATRIOT?

I. INTRODUCTION

*Resolved: that the flag of the United States be thirteen stripes alternate red and white; that the Union be thirteen stars, white in a blue field, representing a new constellation.*¹

The Continental Congress, on June 14, 1777, thus created the flag of the United States. A year earlier it had declared independent the country which that flag was to represent. Nearly two hundred years later the same country and flag are facing what is characterized in prosaic jurisprudential understatement as "difficult times," and the criminality of flag desecration under the laws of all fifty states² and under a federal statute³ has become a major legal issue.

An examination of these statutes must of necessity begin with two major premises: first, that the flag is a symbol of the country and, second, that the government has a sufficient interest in the flag as such a symbol to justify the assertion of its police power to protect it. The government's interest in the flag, say the courts, is in the prevention of its dishonor.⁴ The dishonor contemplated by the legislators has taken several forms. In 1968 the Senate Judiciary Committee, in reporting out the federal flag desecration statute, commented that dishonor of the flag "inflicts injury on the entire nation."⁵ While the 1968 enactment was admittedly a reaction to a recent series of flag-burning incidents both here and abroad by United States citizens,⁶ the original state flag acts, most of which were adopted at the turn of the century, were prompted by a different form of dishonor. These statutes were enacted primarily to prevent the use of flag facsimiles in advertising and political campaigns⁷ and thereby eliminate commercial exploitation of the national symbol. In addition to the original purposes of the anti-desecration acts, various tangential considerations, unrelated to the prevention of flag dishonor, have been used to support the legitimacy of these statutes. Americans are so devoted to their flag, some courts

1. 8 Journal of the Continental Congress 464 (1777).

2. See, e.g., MD. ANN. CODE art. 27, § 83 (1971); N.J. STAT. ANN. § 2A:107-2 (1969); N.Y. GEN. BUS. LAW § 136 (McKinney 1968). See generally Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345 (1970).

3. 18 U.S.C. § 700 (Supp. V, 1970).

4. See, e.g., *Halter v. Nebraska*, 205 U.S. 34 (1907).

5. SENATE COMMITTEE ON THE JUDICIARY, REPORT ON FLAG DESECRATION LAW, 90th Cong., 2d Sess. (1968); 2 U.S. CODE CONG. & AD. NEWS 2507, 2508 (1968).

6. *Id.*

7. See THE NATIONAL OBSERVER, July 13, 1970, at 20. See also *Ruhrstrat v. Illinois*, 185 Ill. 133, 57 N.E. 41 (1900).

say, that a public act of desecration may touch off riots, thereby breaching the peace.⁸ Such violent reaction could, moreover, place the safety of the desecrator in jeopardy.⁹ It has even been suggested that, since the flag desecration statutes impose no inconvenience or burden on anyone, there should be no objection to their passage.¹⁰

The conduct proscribed by flag desecration laws is nearly uniform in all state jurisdictions. The Maryland flag desecration statute, unchanged since its enactment in 1918, is typical: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."¹¹ Related to the statutes prohibiting desecration of the flag are non-penal statutes relating to flag protocol.¹² These laws have set standards for the proper use and display of the flag. Willful disregard of these protocol statutes has been considered to be "casting contempt" on the flag¹³ within the meaning of the penal statute. Thus, such intentional violations of flag protocol as flying the flag upside down under inappropriate circumstances or placing the American flag in a position subordinate to another flag have been brought within behavior proscribed as desecration.¹⁴ The offense is normally a misdemeanor;¹⁵ in Maryland, the penalty is imprisonment for not more than one year and/or a fine of not more than \$1000.¹⁶ In some states, however, the sanctions are severe, ranging up to five years and, in one case, up to twenty-five years.¹⁷

The federal flag desecration statute, the violation of which is also a misdemeanor, is more narrowly drawn: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined. . . ."¹⁸

8. *See, e.g.*, *Street v. New York*, 394 U.S. 576, 590-94 (1969); *State v. Peacock*, 138 Me. 339, 25 A.2d 491 (1941).

9. *Street v. New York*, 394 U.S. 576 (1969).

10. 2 U.S. CODE CONG. & AD. NEWS 2507, 2509 (1968).

11. MD. ANN. CODE art. 27, § 83 (1971).

12. *See, e.g.*, 36 U.S.C. §§ 172-81 (1968); MD. ANN. CODE art. 27, §§ 81-87 (1971).

13. *See Hodsdon v. Buckson*, 310 F. Supp. 528 (D. Del. 1970).

14. Such desecration, however, has seldom sustained a conviction in the absence of a clear showing of contempt. A twenty-year-old defendant in Fairfax County, Virginia, arrested for flying a flag upside down on his car antenna was released on the ground that he didn't have the necessary criminal intent because of his "muddled" thinking. *The Washington Post*, July 8, 1970. Elizabeth Hubner of New York, one-time winner of the American Legion Americanism Award, was arrested, handcuffed, searched, fingerprinted, and jailed for flying the American flag upside down. She was not convicted. *The Washington Post*, Jan. 14, 1970, and Mar. 18, 1970. An American Legion Post in the same town had previously done the same act in protest to United States inaction over the capture of the Pueblo. No action was taken. *TIME*, July 6, 1970, at 14. *See Hodsdon v. Buckson*, 310 F. Supp. 528 (D. Del. 1970).

15. *See, e.g.*, DEL. CODE ANN. tit. 11, § 533 (Supp. 1968); MD. ANN. CODE art. 27, § 85 (1971); N.Y. GEN. BUS. LAW § 136 (McKinney 1968).

16. MD. ANN. CODE art. 27, § 533 (1971).

17. *E.g.*, ALA. CODE tit. 14, § 190 (Supp. 1967) (two years); MONT. REV. CODE ANN. § 94-3581 (1947) (five years); OKLA. STAT. tit. 21, § 372 (Supp. 1969) (two years); TEX. PEN. CODE ANN. art. 152 (1952) (25 years).

18. 18 U.S.C. § 700 (Supp. V, 1970). The penalty for violation of the federal statute is the same as for violation of the Maryland statute — imprisonment for not more than one year and/or a fine of not more than \$1000.

The distinction between the federal and state statutes is important. The wording of the original draft of the federal statute was the same as the uniform language of most state flag laws. Prior to enactment the statute was reworded upon the recommendation of then United States Attorney General Ramsey Clark and adopted by amendment in the Senate Judiciary Committee.¹⁹ This change in verbiage resulted from a fear by the Justice Department as well as by many legislators that the language in the original draft was overly vague and might represent an abridgement of the first amendment freedom of speech. There are three significant differences between the original draft and the enacted statute:²⁰ (1) the word *defies* was not included in the enacted statute because it was considered to be overly vague; (2) *by word* in the phrase "by word or act cast contempt upon" was removed because it would allow prosecution for speech not necessarily accompanied by an act of desecration, which would be in violation of the first amendment; and (3) the list of offending acts — trampling, burning, defiling, etc. — was used to define contempt rather than to state separate elements of criminal behavior.²¹

The 1968 federal statute is the only recent enactment pertaining to desecration of the American flag. The state flag desecration laws have, for the most part, been in effect for nearly half a century²² but, prior to the last few years, were rarely invoked. The numerous recent attacks on the flag which were made in protest of national policy have prompted the states to renew prosecutions.²³ Some states have gone so far as to increase the statutory penalty for flag desecration. Illinois, for example, has raised the maximum sentence for violation of its flag desecration law from thirty days to five years.²⁴ It is this increase in governmental interest in preserving the honor of the flag which has presented questions concerning infringement of the freedom of speech that were never before considered.²⁵

II. SYMBOLIC SPEECH AND ITS LIMITS

The fear that an overly broad anti-desecration statute would conflict with the individual's freedom of speech to the point of being unconstitutional led to the amendment in committee of the original draft of the federal statute. But even if contempt "by word" is not proscribed, these statutes could still be viewed as a violation of free speech.

19. 2 U.S. CODE CONG. & AD. NEWS 2507 (1968).

20. Compare MD. ANN. CODE art. 27, § 83 (1971), with 18 U.S.C. § 700 (Supp. V, 1970). See text accompanying notes 11 & 18 *supra*.

21. 2 U.S. CODE CONG. & AD. NEWS 2507 (1968). See *Street v. New York*, 394 U.S. 576 (1969).

22. See note 7 *supra* and accompanying text. For example, Maryland's flag desecration law was enacted in 1918, New Jersey's in 1904, and New York's in 1909. See generally Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345 (1970).

23. See generally TIME, July 6, 1970, at 8.

24. Compare ILL. REV. STAT. ch. 56½, § 6 (1969), with § 1, [1907] ILL. LAWS 351. See Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345 (1970).

25. Compare *United States v. Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969), with *People v. Pickering*, 23 N.Y.S.2d 148 (N.Y. City Magis. Ct. 1940).

The current interpretation of first amendment applicability to flag desecration prosecutions has its roots in the concept of symbolic speech developed by the Supreme Court in its 1931 decision of *Stromberg v. California*.²⁶ This decision established that non-verbal acts may constitute speech which is subject to first amendment protection. A California statute forbidding the display of a red flag "as a . . . symbol or emblem of opposition to organized government" was there held to be unconstitutional after it was used to prosecute a member of the Young Communist League who raised a red flag daily at a children's summer camp as an expression of sympathy for the communist movement. Protection of non-verbal speech was reinforced by the Court in *Tinker v. Des Moines Independent Community School District*,²⁷ which involved a prohibition of the wearing by high school students of black armbands to protest American policy in Vietnam. Speaking for the Court, Justice Fortas saw the act of wearing the armbands as being "closely akin to 'pure speech'"²⁸ and an attempt to regulate those acts as coming into collision with "primary First Amendment rights."²⁹ The concept of symbolic speech is thus sufficiently established and accepted today for courts to take judicial notice of the symbolic significance of flying the American flag.³⁰

The right of free speech recognized by the first amendment is not limitless in its protection of either actual or symbolic speech.³¹ The fewest limitations are on actual verbal speech, which is usually restricted only in order to prevent the incitement of riot, violence, or disorder.³² In 1942 the Supreme Court ruled in *Chaplinsky v. New Hampshire*³³ that calling a city official a "God damned racketeer" and a "damned Fascist"³⁴ was within a certain class of speech, narrowly defined, that was not protected by the first amendment. This class included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"³⁵ and was subject to legitimate regulation without violating the Constitution. The Court's rationale for recognizing this unprotected class of speech was that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."³⁶ Likewise, utterances of a high school student which amounted to gross disrespect to his principal have been held to be unprotected from the regulatory power

26. 283 U.S. 359 (1931).

27. 393 U.S. 503 (1969).

28. *Id.* at 505.

29. *Id.* at 508.

30. *See, e.g.,* Hodsdon v. Buckson, 310 F. Supp. 528, 533 (D. Del. 1970).

31. *See, e.g.,* Near v. Minnesota, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Schenck v. United States*, 249 U.S. 47 (1919).

32. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940); *Near v. Minnesota*, 283 U.S. 697 (1931). *See* note 109 *infra*.

33. 315 U.S. 568 (1942).

34. *Id.* at 569.

35. *Id.* at 572.

36. *Id.*

of the state.³⁷ Decisions as to proper limitations on symbolic speech are further complicated by the possibility that the state may have a legitimate interest in regulating the conduct aspect of the activity. Thus, articulation of a formula for these limitations requires a different approach than that applied to actual speech. The most workable starting point for such an analysis is *O'Brien v. United States*.³⁸ O'Brien burned his draft card in an attempt to persuade others to adopt his anti-war views. He protested that his conviction under the federal statute that imposes criminal sanctions upon one who "knowingly destroys"³⁹ his draft card infringed upon his right of free speech. In affirming the trial court's decision, the Supreme Court examined the nature of O'Brien's conduct and decided that at least part of it did not constitute speech: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁴⁰ Acknowledging *arguendo* that "the alleged communicative element in O'Brien's conduct"⁴¹ was itself entitled to first amendment protection, the Court felt that this protection did not extend to the noncommunicative part of his action.⁴² When, as in *O'Brien*, the communicative and noncommunicative elements are mere aspects of one act, the elements are not severable; consequently, either both elements fall under incidental first amendment protection or neither do. Whether protection of the communicative element of symbolic speech is to be sacrificed to regulation of the noncommunicative element depends on the value which the courts place upon the governmental regulatory interest involved. In *O'Brien* the Court stated:

... when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.⁴³

Recognizing that the meaning of these adjectives is often too imprecise for objective applicability, the Court went on to define a sufficient

37. *Schwartz v. Schuker*, 298 F. Supp. 238 (E.D.N.Y. 1969). In this case, a high school student was suspended from school for attempting to circulate copies of an underground newspaper containing obscenities and nihilistic propaganda. The court held that, while there is no right to suppress speech merely because it may be offensive to those in authority or opposed by the majority, the protection of the social interests in government, order, and morality will allow valid restrictions on the right to free speech. The utterances of the student in this case were such as to be unprotected by the first amendment; hence, his suspension from school was not an interference with his right to such protection.

38. 391 U.S. 367 (1968).

39. *Id.* at 370.

40. *Id.* at 376.

41. *Id.*

42. *Id.* at 376, 382.

43. *Id.* at 376-77 (citations omitted).

government interest in terms of a rather extraordinary set of four criteria:

... we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴⁴

Since Congress's power to raise and support armies was such a "substantial government interest," its prohibition of draft card burning, as a necessary exercise of that power, took precedence over O'Brien's interest in speaking symbolically by way of that act; therefore, O'Brien's prosecution was constitutional.⁴⁵

In flag desecration cases, courts have traditionally held that a sufficient governmental interest existed in protecting the flag as the national symbol to support the validity of the states' anti-desecration statutes. A distinction can be made, however, between contemporary flag cases and older ones. In early prosecutions under state laws, freedom of symbolic speech arguments were not involved; most of such prosecutions were for using the emblem of the flag in advertising campaigns.⁴⁶ It is clear that, at least to this extent, a state has the power to restrict the use of the flag of the United States. In 1907, the Supreme Court in *Halter v. Nebraska*⁴⁷ recognized the existence of this power in affirming the conviction under a state flag desecration law of a manufacturer who misused the flag to promote his product. The *Halter* decision concluded that "a state may exert its power to strengthen the bonds of the Union" by making the desecration of the national symbol a crime and thus "may encourage patriotism and love of country."⁴⁸ For the next half-century scattered convictions were summarily upheld on the authority of *Halter*.⁴⁹ A variation of this reasoning appeared in a 1942 Maine case which noted that, since desecration of the flag "would shock the public sense" and "would be likely to result in breaches of the peace,"⁵⁰ the government's interest in preventing such breaches justified the statutory prohibition of desecration.

Since neither the issue of symbolic speech nor, in fact, any first amendment challenge was ever raised in these cases by the defendants, the courts found no difficulty in recognizing the sufficiency of the governmental interest in order to validate the statutes under which

44. *Id.* at 377.

45. *Id.* at 377-86.

46. See *Halter v. Nebraska*, 205 U.S. 34 (1907); *Rhustrat v. People*, 185 Ill. 133, 57 N.E. 41 (1900); *People v. Pickering*, 23 N.Y.S.2d 148 (N.Y. City Magis. Ct. 1940).

47. 205 U.S. 34 (1907).

48. *Id.* at 42.

49. See, e.g., *McKee v. State*, 219 Ind. 247, 37 N.E.2d 940 (1941); *State v. Scheuter*, 127 N.J.L. 496, 23 A.2d 249 (1941); *People v. Pickering*, 23 N.Y.S.2d 148 (N.Y. City Magis. Ct. 1940).

50. *State v. Peacock*, 138 Me. 339, 340, 25 A.2d 491, 492 (1942).

the defendants were prosecuted. There was no need for them to engage in the type of balancing process that was required in *O'Brien* to determine whether the governmental interest there was strong enough to override *O'Brien's* right to engage in symbolic speech. Consequently, the notion that the government possessed a sufficient interest in protecting the honor of the flag to justify the statutory prohibition of desecration became imbedded in the law without consideration of the nonspeech circumstances of its birth. Thus, when in the past few years flag desecration assumed sufficient speech characteristics to support a first amendment challenge, the *O'Brien* decision found an easy transfer to flag cases. Speech and nonspeech elements were present no less in burning flags than in burning draft cards. The guidelines of *O'Brien* have provided a strong base for upholding recent convictions of flag desecrators.

In the well-publicized case of *Hoffman v. United States*,⁵¹ the Court of Appeals for the District of Columbia quoted *O'Brien* at length to support its conclusion that the government had a "substantial, genuine and important interest in protecting the flag from public desecration by contemptuous conduct,"⁵² thus justifying the "incidental" limitation of speech resulting from such regulation. The defendant, Abbie Hoffman, had "defiled" the American flag within the meaning of the federal statute by wearing a shirt apparently fashioned from the flag, an act of symbolic speech. The *Hoffman* decision was, in turn, used by the same court in *Joyce v. United States*⁵³ to uphold the conviction of a defendant who split a flag and attached it to his fingers held in a "V" sign. The four criteria in *O'Brien*⁵⁴ were similarly employed by a California federal district court in convicting a defendant under the new federal flag desecration statute.⁵⁵ The decision, involving the prosecution of an anti-war demonstrator for burning the flag, characteristically restricts an individual's freedom of speech only to the extent that that speech consists of flag desecration. The limits are on one mode of expression only; Joyce was not prosecuted for protesting the war, but for destroying the country's flag in so doing.

III. COMPULSORY PATRIOTISM AND THE DOCTRINE OF OVERBREADTH

Even assuming the legitimacy of the limits, articulated in *O'Brien*, which government can place on symbolic speech, the motive force behind flag desecration statutes — the desire for compulsory patriotism — has never been popular with American courts. The law of the land, in so far as compelling *adherence* to the flag, is unquestionably the rule of *West Virginia Board of Education v. Barnette*.⁵⁶ The oft-quoted

51. 256 A.2d 567 (D.C. Ct. App. 1969).

52. *Id.* at 569.

53. *Joyce v. United States*, 259 A.2d 363 (D.C. Ct. App. 1969).

54. See text accompanying note 44 *supra*.

55. *United States v. Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969).

56. 319 U.S. 642 (1943). The religious beliefs of Jehovah's Witnesses include the teaching that an obligation imposed by God's law is superior to temporal government

opinion of Mr. Justice Jackson in that case lays a very relevant basis for a discussion of flag desecration. The state, he said, could not make the performance of a flag salute by school children mandatory since such a requirement could force a person "to utter what is not in his mind."⁵⁷ The Constitution does not allow government to dictate what is "orthodox in politics, nationalism, religion, or other matters of opinion"⁵⁸

That government cannot compel gestures of adherence to its flag, then, is settled;⁵⁹ the question now at hand is whether it should be able to punish gestures of contempt. To the extent that "gestures" are only actual speech, it is certain that their prohibition violates the first amendment. This was the decision of the Supreme Court in *Street v. New York*,⁶⁰ a 1969 case which went no further than to condemn infringement of actual speech gestures of contempt because the case was decided on the basis of the application of a state statute rather than its validity. Street had publicly burned his flag in violation of a New York flag desecration statute (which was, incidentally, substantially the same as Maryland's).⁶¹ As he burned the flag, he made utterances that might have been construed as casting contempt upon the flag "by word."⁶² The Court did not decide whether he might be punished for burning the flag;⁶³ since the statute allowed conviction merely for the utterance of contemptuous words and since there was the possibility that that had been the basis for Street's conviction, the Court felt that the statute might have been unconstitutionally applied to violate his right of free speech. Thus, only the actual speech of Street was protected by this decision. *Street* did not answer the question which is central to the validity of flag desecrations: Should the government have the power to punish gestures of contempt, such as burning the flag, which consist solely of symbolic speech? Some courts, such as the District of Columbia Court of Appeals in *Hoffman* and *Joyce* have answered this question in the affirmative. On the other

and that to pledge allegiance to the flag was a literal violation of Exodus, Ch. 20, verses 4 and 5: "Thou shalt not make unto thee any graven image. . . ." Accordingly, their refusal to salute the flag resulted in a series of prosecutions at that time, before the decision in *Barnette*. See, e.g., *Minersville School Dist. v. Gobots*, 310 U.S. 586 (1940) (directly overruled by *Barnette* three years later); *Zimmerman v. State*, 77 Okla. Crim. 259, 141 P.2d 118 (1943); *Bolling v. Superior Court*, 16 Wash. 2d 373, 133 P.2d 803 (1943).

57. 319 U.S. at 634.

58. *Id.* at 642.

59. For recent applications of the rule of *Barnette*, see *Banks v. Board of Public Instruction*, 314 F. Supp. 285 (S.D. Fla. 1970); *Lundquist v. State*, No. 19,902 Equity (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

60. 394 U.S. 576 (1969), noted in 58 Ky. L. REV. 388 (1970) and 48 N.C.L. REV. 328 (1970).

61. Compare N.Y. GEN. BUS. LAW § 136 (McKinney 1968), with Md. ANN. CODE art. 27, § 83 (1971).

62. N.Y. GEN. BUS. LAW § 136(b) (McKinney 1968) states that the crime of flag desecration has been committed by one who shall "publicly mutilate, deface, defile or defy, trample upon, or cast contempt upon either *by words* or act." (Emphasis added.)

63. In fact the case was remanded, creating a possibility that Street could be convicted for the flag burning alone.

hand, several courts have invalidated state action which curtailed activity that could have been considered symbolic speech.⁶⁴

In *Korn v. Elkins*,⁶⁵ a case involving Maryland law, the editors of *Argus*, a student magazine at the University of Maryland, proposed to print a cover picture of a burning American flag. The University, advised by the Maryland Attorney General that the publishing of such a magazine cover would violate the Maryland flag desecration statute,⁶⁶ prohibited the printing. In a suit by the editors to enjoin the University from interfering with the printing, a three-judge panel of the federal district court for Maryland ruled that the University's refusal to allow *Argus* to publish the burning flag photo was an unconstitutional abridgement of speech. As in *Street*, the court did not rule on the validity of the statute itself but only on its application.⁶⁷ The court simply concluded, without discussion of the symbolic speech elements of the acts, that a picture in a magazine was pure speech, and thus avoided the *O'Brien* test.

The Delaware federal district court, however, has invalidated the Delaware state flag desecration statute itself in *Hodsdon v. Buckson*.⁶⁸ Unlike the Supreme Court in *Street*, this district court was faced with only an act of alleged desecration. Hodsdon was indicted for flying his flag at half mast and in a position subordinate to the United Nations flag in violation of the Delaware anti-desecration statute.⁶⁹ In contrast to the Universal Military Training and Selective Service Act⁷⁰ involved in *O'Brien*, the Delaware flag desecration statute was neither narrowly drawn nor clearly directed toward protecting the functions of a national administrative scheme. The state's interest in protecting

64. See, e.g., *Korn v. Elkins*, 317 F. Supp. 138 (D. Md. 1970); *Hodsdon v. Buckson*, 310 F. Supp. 528 (D. Del. 1970).

65. 317 F. Supp. 138 (D. Md. 1970).

66. Letter from Estelle A. Fishbein, Assistant Attorney General of the State of Maryland, to Dr. Wilson H. Elkins, President, University of Maryland, Dec. 3, 1969, appended as exhibit 5 to plaintiff's complaint, *Korn v. Elkins*, Civ. No. 70-47-N (D. Md. 1970).

67. 317 F. Supp. at 144. The issue of whether the Maryland flag desecration statute was valid on its face was not easily severable and thus was difficult to isolate in the case. Defendants, as University officials and responsible for the contents of *Argus*, could have been prosecuted under the statute's sanction. Acting in legitimate apprehension of such sanction, they utilized their authority to exert control over publication, not by direct censorship, but rather by withholding University funds for the printing costs. For flag desecration purposes, a clearer decision might have resulted if the state itself had enjoined the publication of, or prosecuted the editors of, *Argus* (this was a practical impossibility as the University was unavoidably a legal buffer). Courts, however, have been reluctant to attack the statutes on their face. See notes 114-17 *infra* and accompanying text.

68. 310 F. Supp. 528 (D. Del. 1970). The assertion of jurisdiction by the Delaware federal district court to enjoin the state prosecution is now subject to reversal. Federal courts may not enjoin, on the basis of alleged statutory abridgment of a constitutional provision, prosecution for a violation of a state statute during the pendency of the state court litigation. Only in extraordinary circumstances in which there is a showing of harassment or irreparable injury will a federal court be able to enjoin such state action. *Younger v. Harris*, 39 U.S.L.W. 4201 (U.S., Feb. 23, 1971). The same restriction applies to the granting of declaratory judgments. *Samuels v. Mackell*, 39 U.S.L.W. 4211 (U.S., Feb. 23, 1971).

69. Compare DEL. CODE ANN. tit. 11, § 533 (Supp. 1968), with MD. ANN. CODE art. 27, § 83 (1971).

70. 50 U.S.C. § 462(b) (6) (1964), as amended, 50 U.S.C.A. § 462(b) (6) (1968). This statute is now known as the Military Selective Service Act of 1967.

the national symbol was, conceded the court, a legitimate one; but in the pursuance of that interest the statute was unconstitutionally overbroad in that the legislature, "having the power to regulate certain conduct," drafted a law which "strikes so bluntly as to proscribe constitutionally protected conduct as well."⁷¹ This conclusion was reached by use of the full force of the combined doctrines of *Stromberg* and *Barnette* that the government may not punish gestures of contempt for "ideas bespoken by the flag"⁷² since in so punishing, the statute was "directed not to rules, if they exist, governing display of the flag, but to the attitude displayed by the person who flies it."⁷³ It was felt that the Delaware flag desecration law struck "where no interest is served other than the proscription of expression"⁷⁴ and that in so doing the statute itself was unconstitutionally overbroad. Invalidation of this statute for overbreadth leaves open the question of whether Hodsdon's conduct was protected from punishment. It is submitted that the court's reasoning followed to its logical conclusion would produce the result that his conduct was protected.

Even when viewed within the context of their relatively narrow holdings, cases like *Hodsdon* and *Street* have provided some guiding principles for subsequent decision. *Street*, for example, could not validly have been convicted on a theory that his remarks failed to show proper respect for the flag; the *Street* court cited *West Virginia Board of Education v. Barnette*⁷⁵ for this proposition. In addition, the Supreme Court in *Street* employed the rule of *Stromberg v. California*,⁷⁶ which had invalidated a general verdict because of its possible punishment of symbolic speech. When the element of symbolic speech is added to the types of issues presented in flag desecration, the nexus between *Barnette* and *Stromberg* becomes much stronger. Taken together, the rationale of these two cases can be used to reach the conclusion that the government cannot prohibit peaceful symbolic acts that reject the ideas which the flag as a symbol represents.

It was upon this basis that the Second Circuit Court of Appeals in *Long Island Vietnam Moratorium Committee v. Cahn*⁷⁷ declared New York's flag desecration statute to be unconstitutional (1) on its face and (2) as it was applied to the symbolic conduct of the plaintiffs. The Committee sought to enjoin the district attorney from prosecuting Committee members under New York's anti-desecration statute. The "desecration" complained of involved the dissemination of a facsimile of the American flag with a "peace symbol" in the field of blue. The Second Circuit decided the case on a direct extension of the holding in *Street v. New York*⁷⁸ to cover non-verbal or visual communication involving the flag.

71. 310 F. Supp. at 532.

72. *Id.* at 535.

73. *Id.* at 534.

74. *Id.*

75. 319 U.S. 642 (1943).

76. 283 U.S. 359 (1931).

77. No. 35287 (2d Cir., Dec. 24, 1970).

78. 394 U.S. 576 (1969).

The *Long Island* case completes the logical development begun in *Street* and extended in *Hodsdon*. In dismissing the state's interest in forced respect for the flag, the court adopted the position alluded to but never fully accepted in those cases.⁷⁹ It is now clear that this reasoning can be used to find that a statute which compels adherence to "a series of taboos concerning flag display"⁸⁰ cannot be upheld. Similarly, since flag usage is a means of expression, acts of desecration performed as symbolic speech can no longer be considered unlawful.

Faced with an increasing number of prosecutions under statutes prohibiting the flag's dishonor, lower state courts, as well as the federal courts, have had to face the issue of their statute's constitutionality. A typical example of this problem might be found in Maryland. What is now section 83 of article 27 of the Maryland Annotated Code was enacted in 1918 using the uniform wording found in the New York and Delaware statutes herein discussed.⁸¹ Much insight into the validity of the Maryland statute can be gained by examining *Lundquist v. State*,⁸² in which an analogous statute was involved. The facts in this case, decided in 1970 by the Circuit Court of Anne Arundel County, were similar to those of *West Virginia Board of Education v. Barnette*⁸³ and centered on Lundquist's refusal to comply with the newly-enacted Maryland statute requiring that all public school children each day pledge allegiance to and salute the American flag. Not only did the statute require the pledge and the salute, but apparently required that these acts be done in a respectful manner. The statute contained the following sentence: "Any person . . . who may commit an act of disrespect, either by word or action, shall be considered to be in violation of the intent of this section."⁸⁴ Unlike the situation in *Barnette*, Lundquist's refusal was "entirely apart from any religious beliefs";⁸⁵ nevertheless, the circuit court ruled that the statute was unconstitutional in its entirety, following *Barnette*.

The decision is significant for two reasons. First, it is a specific application of the *Barnette* actual speech rule to the Maryland statute. But more importantly, the decision is an apparent recognition of the rationale of *Hodsdon v. Buckson* that the government may not regulate symbolic speech by employing a statute which is overly broad and which is directed not to the furtherance of a governmental interest which has but incidental, albeit significant, effects on the right to make symbolic speech (as in *O'Brien*), but rather "to the attitude displayed by the person" who is made subject to the statute.⁸⁶ Specifically, even though the decision in *Lundquist* did not deal with flag desecration

79. See note 73 *supra* and accompanying text.

80. *Long Island Vietnam Moratorium Comm. v. Cahn*, No. 35287 (2d Cir., Dec. 24, 1970).

81. Ch. 281, § 74B, [1918] Md. Laws 676. See notes 61 & 66 *supra* and accompanying text. See also Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345, 356 (1970).

82. No. 19,902 Equity (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

83. 319 U.S. 624 (1943). See notes 56-58 *supra* and accompanying text.

84. MD. ANN. CODE art. 77, § 77 (Supp. 1970).

85. *Lundquist v. State*, No. 19,902 Equity, at 2 (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

86. *Hodsdon v. Buckson*, 310 F. Supp. 528, 534 (D. Del. 1970).

per se, it concerned itself with protecting symbolic speech. The court reasoned that an "act of disrespect by action" which was in violation of the statute could include such symbolic speech as "standing silently while others recite the pledge or remaining seated while others recite."⁸⁷ The court found that the section of the act prohibiting disrespect was vague and that this vagueness rendered the entire statute unconstitutional.

The language of the provision of the flag salute statute, quoted *supra*, which the court in *Lundquist* declared to be unconstitutionally vague is very similar to that of the Maryland anti-desecration statute, which reads: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag"⁸⁸

The difference between "commit an act of disrespect, either by word or action" and "by word or act cast contempt upon"⁸⁹ is indistinguishable. In light of the similarities between the two statutes in question, it is apparent that the rationale of *Lundquist* could easily be applied to invalidate the Maryland flag desecration law.⁹⁰

The fears that prompted Congress when enacting the federal anti-desecration statute to abandon the type of wording found in the Maryland statute⁹¹ have been justified. Overbreadth and vagueness are, as pointed out by Justice Harlan in *Zwickler v. Koota*,⁹² not always easy or profitable to distinguish; and they are both deadly maladies to a statute. The rationale employed in *Hodsdon v. Buckson*, that "casting contempt" on a flag is a catchall which could, by including many acts and gestures whose prohibition is far beyond the reaches of governmental interest, render that statute unconstitutionally overbroad, coupled in Maryland with the holding in *Lundquist* that a statutory prohibition of any "act of disrespect" toward the flag was unconstitutionally vague, demands that a more definitive re-wording be substituted for "cast contempt." The decision in *Street*, as demonstrated by the state's concession in *Lundquist* and the holding in *Hodsdon*, necessitates the deletion of the prohibition of contempt "by word" from the typical state statute. A more narrow definition such as that contained in the federal statute will be required if state prohibitions of flag desecration are to be upheld by the courts.

IV. QUALITY OF THE GOVERNMENTAL INTEREST

The decisions discussed to this point have all assumed the existence of a sphere of conduct which the government's interest entitles the government to prohibit; these cases have concerned themselves with

87. *Lundquist v. State*, No. 19,902 Equity (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

88. MD. ANN. CODE art. 27, § 83 (1971).

89. Compare ch. 737, § 1, [1970] Md. Laws 2062, with MD. ANN. CODE art. 27, § 83 (1971).

90. *Lundquist v. State*, No. 19,902 Equity, at 8 (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

91. See note 19 *supra*.

92. 389 U.S. 241 (1967).

defining the limits of this sphere and deciding whether the particular conduct in question is within or without the sphere. The sphere thus defined has been limited to acts of symbolic speech which fit within the *O'Brien* rationale, that is, which are not severable from nonspeech elements of the act, which elements the government may properly regulate or prohibit under the four criteria of *O'Brien*.⁹³

There is another avenue of inquiry that, without regard to the narrowness of the statute, goes to the core of punishing the act of desecration. Does a government interest in protecting the honor of the flag actually exist at all? Historically speaking, the government has had little or no concern for the flag as a symbol. In 1796 Timothy Pickering, Secretary of State in the Washington Administration, was rebuked by the minister of France over the President's nonchalance toward the French flag. The American people, he replied, did not need symbols of "their triumphs, or the monuments of their freedom. Understanding in what true liberty consists, contented with its enjoyment, and knowing how to preserve it, they reverence their own customs . . ."⁹⁴ And in the Washington of 1817, it was one day noted that the flag flying over the Navy Yard had a mere nine stripes while the flag over the congressional building had eighteen. One researcher has noted that "[n]ot until the beginning of the Civil War did the flag begin to be generally endowed with special patriotic symbolism."⁹⁵

With the exception of the Continental Congress's resolution creating the flag, no legislation concerning it or protecting it as a national symbol was passed anywhere in the country until around the turn of the century when the states began enacting flag desecration statutes.⁹⁶ No federal legislation was enacted until 1942, when the non-penal flag protocol rules became law,⁹⁷ and there was no federal penal statute until the 1968 anti-desecration act.⁹⁸ Protecting the flag through the threat of penal sanctions in such a manner has never (at least prior to the last seventy-five years) been a part of the Anglo-American legal tradition; in fact, Britain has never had a law making it a crime to desecrate the Union Jack.⁹⁹ Yet, despite this tradition of nonchalance, there developed a feeling, first fostered in the

93. See text accompanying note 44 *supra*.

94. THE NATIONAL OBSERVER, July 13, 1970, at 20.

95. *Id.*

96. See Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345, 362 (1970), where the author sets forth in an appendix, among other things, the date of enactment of each of the state flag desecration statutes. See also notes 7 & 22 *supra*.

97. 36 U.S.C.A. §§ 171-82 (1968).

98. 18 U.S.C. § 700 (Supp. V, 1968).

99. There are few references to the flag of Great Britain under British law. Its primary importance as a symbol of England, in as much as the law was concerned, was in maritime navigation. Improper use of the British flag to assume the "British National Character" (unless to evade capture by an enemy or foreign ship) was punishable by forfeiture of the ship. M.S. Act, 1894, s. 69(1). The act also included flag protocol to be used on the high seas. Englanders were, though, restricted in their use of a flag (this applied to any flag, not just the national banner) in another way. It was forbidden to hang a flag over a carriage way of a street for advertising purposes without the consent of the borough council. LONDON COUNTY COUNCIL (GEN. POWERS) ACT, 1924 (14 & 15 Geo. 5, c. lvii), s. 54. See THE NATIONAL OBSERVER, July 13, 1970, at 20.

1890's by the American Flag Association,¹⁰⁰ that statutory protection for the honor of the American flag was needed. Anti-desecration legislation was validated, as in the 1907 *Halter* decision, as a legitimate exercise by the state governments of a power to "encourage patriotism and love of country."¹⁰¹ Other ways of exercising this power have since then been rejected by *Barnette, Street, et al.*, thereby forcing a reexamination of the validity of the power itself. It is commonly held by America's courts today that coerced patriotism is not a legitimate governmental interest.¹⁰² As Justice Harlan commented in *Street's* majority opinion, free speech encompasses "the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."¹⁰³

Flag desecration statutes have also been justified as a valid exercise of the government's power to maintain the peace.¹⁰⁴ Unlike the encouragement of patriotism, the maintenance of civil order is clearly a legitimate government interest; however, on examination it offers no support for anti-desecration laws. The act of flag desecration does not, by itself, ordinarily constitute a breach of the peace; it generally involves the destruction, mutilation, or disparagement of property either belonging to the desecrator or used with the owner's consent and often consists of nothing more than the display of a decal or painted emblem in traditionally inappropriate ways. Flag desecration is a category of various acts, passive or not, only some of which can be considered breaches of the peace. Such acts which do constitute breaches of the peace can be adequately prevented and controlled as such, rather than as acts of flag desecration, through the use of traditional breach-of-peace statutes. By prohibiting all acts of desecration in order to prevent some which may constitute breaches of the peace, the anti-desecration statutes are again overbroad and, therefore, constitutionally suspect. While it is possible that an act of desecration which is itself peaceful may provoke hostile reactions by observers which may themselves constitute breaches of the peace, it is well settled that the possibility of such an occurrence is constitutionally insufficient reason for prohibiting or otherwise regulating peaceful expression. This rule was articulated as recently as 1969 in *Tinker v. Des Moines Independent Community School District*,¹⁰⁵ which stated that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."¹⁰⁶ Of course, the freedom of speech is not an absolute license. Even in the absence of flag desecration statutes, the extreme desecrator could be prosecuted under the rationale of *Chaplinsky v. New Hampshire*.¹⁰⁷ if the desecrator's

100. See Commissioner's Prefatory Note, 9B UNIFORM LAWS ANN. 48 (1966).

101. *Halter v. Nebraska*, 205 U.S. 34, 42 (1907).

102. See, e.g., *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943); *Lundquist v. State*, No. 19,902 Equity (Cir. Ct. Anne Arundel County, Md., Sept. 3, 1970).

103. 394 U.S. at 593.

104. See, e.g., *State v. Peacock*, 138 Me. 339, 25 A.2d 491 (1941).

105. 393 U.S. 503 (1969).

106. *Id.* at 508.

107. 315 U.S. 568 (1942).

action poses a "clear and present danger" his speech may be prevented or punished.¹⁰⁸ But the enforcement of the peace is a separate matter from the prevention of flag desecration. Breach of the peace is a separate legal offense in every jurisdiction.¹⁰⁹

Though hard pressed to find a legally sufficient governmental interest which will justify the enforcement of anti-desecration statutes, the courts all insist that there is one.¹¹⁰ Any such interest must meet the *O'Brien* criteria. The third criterion is to the effect that regulation is sufficiently justified "if the governmental interest is unrelated to the suppression of free expression."¹¹¹ The flag is the symbol of the country. The government's interest is in preventing its dishonor. It is axiomatic that a symbol which is locked in a closet is not a symbol. A symbol by its very being is expressive; so too is its desecration. The act of flag desecration is done for expression and no other reason; whether to expound a political thought or to sell a can of beer, one does not use the flag in hiding. Flag desecration is, therefore, a public act; and every flag desecration statute in existence provides that the act in question, to be prohibited, must be done "publicly."¹¹² As noted by the Supreme Court of Maine in 1942, "It is apparent that the very essence of this offense is its publicity."¹¹³ Thus, to display a flag — or to desecrate it — is pure expression; and the sole purpose for making desecration a crime is, therefore, to suppress the expression of the contempt for the flag which that act denotes, whatever the purpose of that expression may be. *United States v. O'Brien*, the very case which is used as the primary rationale for the narrowed legitimacy of anti-desecration statutes, in fact suggests their inherent invalidity.

With the increase in prosecution for flag desecration, there are a number of recent appellate level cases on the matter. Many have reversed the convictions. It is unfortunate, however, that like *Street* and *Korn v. Elkins*, many courts have found other ways to justify their reversals than by attacking the statute directly. The predominant tool has been statutory interpretation. The Pennsylvania flag desecration statute possesses an escape clause that exempts from its coverage "any patriotic or political demonstration or decorations."¹¹⁴ Under that umbrella a Pennsylvania court held that convictions for exposing in public a flag on which was printed "Make Love Not War" and "The New American Revolutionaries" were not valid because the flag was displayed at a college anti-war demonstration.¹¹⁵ Nor, under the same Pennsylvania exemption, was a young man who reported for his pre-induction physical clad only in undershorts and an American flag

108. *Schenck v. United States*, 249 U.S. 47 (1919).

109. See generally R. PERKINS, *CRIMINAL LAW* 399-409 (2d ed. 1969).

110. See, e.g., *Halter v. Nebraska*, 205 U.S. 34 (1907); *Hodsdon v. Buckson*, 310 F. Supp. 528 (1970).

111. *Id.*

112. See Note, *Flag Waving, Flag Burning, and the Law*, 4 VALPARAISO L. REV. 345, 362 (1970).

113. *State v. Peacock*, 138 Me. 339, 25 A.2d 491, 492 (1941).

114. See Act of June 24, 1939, PENN. PUB. LAW 872, as amended, PENN. STAT. tit. 18, § 4211 (Supp. 1970).

115. *Commonwealth v. Janoff*, 266 A.2d 657 (Pa. 1970).

guilty of flag desecration.¹¹⁶ In Ohio, the conviction of a defendant who wore the United States flag as a cape was reversed under the rationale that "contempt," as construed in accordance with the principle of *ejusdem generis*, did not prohibit wearing the flag.¹¹⁷

Some courts are now meeting the flag desecration statutes head on. Currently, the confrontation is with the vague and broad state statutes, rather than the more narrowly drawn federal statute. As already noted, two courts have struck down state statutes. A more authoritative decision may be at hand. There is presently on the Supreme Court docket for the October 1970 term the case of *Radich v. New York*.¹¹⁸ Unlike *Cowgill v. California*,¹¹⁹ which was denied probable jurisdiction because in it the free speech issue was not sufficiently recognizable (defendant was arrested for wearing a flag vest), *Radich* involves an act of purely symbolic speech and, moreover, brings into question the same New York flag desecration law faced by *Street*. *Radich*, an art dealer, displayed an exhibit in which the American flag was sculpted into obscene figures as a protest against the war. *Radich's* conviction was upheld by the New York Court of Appeals¹²⁰ on the basis of *United States v. O'Brien*.¹²¹ A decision should come of *Radich* either in support of or against the uniform state statutes (of which Maryland's is one). The act involved no actual speech, the statute contains no escape clause, and there would appear to be no possibility that the Court could avoid the confrontation by reasoning that one who fashioned a penis out of the American flag did not intend to cast contempt on that flag.

If the New York statute is struck down on its face, rather than as applied to *Radich*, the question of the validity of the federal statute would remain to be resolved; and the acceptability of the basic premise of flag desecration statutes will remain in abeyance until then.

V. FLAG STATUTES AND THE PUBLIC

The telling blow against all existing flag desecration statutes is made on examination of their administration and execution. When pressed for internal consistency, the "law" of flag desecration becomes a factual absurdity.

In Allegany County, Maryland, a man was sentenced to six months in jail for sewing an American flag to his pants¹²² while in Prince

116. *Commonwealth v. Sgorbati*, 38 U.S.L.W. 2617 (Ct. Comm. Pl. Phila. City, Pa., 1970).

117. *State v. Saionz*, 39 U.S.L.W. 2076 (Ohio Ct. App. 1970). In so ruling the court apparently overlooked the fact that the flag had been slit and burned to make the cape, violating the "mutilation" section of the statute. See also *State v. Turner*, 474 P.2d 91 (Wash. 1970).

118. 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846, *probable jurisdiction noted*, 400 U.S. 864 (1970). Cf. *United States Flag Foundation v. Radich*, 53 Misc. 2d 597, 279 N.Y.S.2d 233 (Sup. Ct. N.Y. County 1970). *Radich v. New York* was affirmed without opinion immediately prior to the printing of this issue (U.S.L.W., Mar. 29, 1971).

119. 396 U.S. 371 (1970).

120. *People v. Radich*, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970).

121. 391 U.S. 367 (1968).

122. Michael E. Stewart, 18, was sentenced to six months in jail by Magistrate F. Allen Weatherholt for wearing a flag sewn to his trouser leg. The Evening Sun

George's County, Maryland, fifty-eight sheriff's deputies recently displayed the new American flags which the department had sewn to their shirts.¹²³ A man was sentenced to six months in jail and fined \$250 for flying a flag with a peace symbol in the field of blue;¹²⁴ but the Maryland Attorney General's Office recently ordered to be dropped charges which had been preferred against two Carroll County youths for displaying an identically altered flag on their car, ruling that in order to desecrate the flag a person must start with a facsimile of it.¹²⁵ Delaware officials have interpreted "to cast contempt upon" the flag as including black power and "clenched fist" salutes at athletic events.¹²⁶ A resolution was introduced in the Virginia legislature to protect the confederate flag as a symbol.¹²⁷ The type of flag vest worn in *United States v. Cowgill*¹²⁸ has been the target of many prosecutions;¹²⁹ yet it bears a significant resemblance to flag vests worn for years with public approval by such well-known figures as Dale Evans and Roy Rogers. An eighteen-year-old in Virginia was put in jail for attaching a flag in two pieces to his Volkswagen.¹³⁰ No prosecution was initiated against the flag-spangled "Silent Majority Special" entered in the 1970 Indianapolis 500 Motorcar race.¹³¹ Examples of such contradictions and double standards abound in the recent flood of magazine and newspaper articles that have investigated the flag controversy.

The results of such an empirical survey of the enforcement of flag desecration statutes point strongly to the conclusion that it is attitude which is punished. There is no other way to explain why a flag sewn to the pants is criminal and a flag sewn to the shirt is not. It is obvious

(Baltimore), Oct. 2, 1970, § C, at 2, col. 3. Tommy A. Rich, in Arlington, Virginia, was sentenced by Judge Martin E. Morris to one year in jail on May 25, 1970, for wearing an upside down American flag sewn to the seat of his pants; all but the three days of the sentence which the defendant had already spent in jail were suspended. The Washington Post, May 26, 1970. For the same offense Christopher Tobia Cole was sentenced to thirty days in jail in Montgomery County, Virginia. The Washington Post, Apr. 18, 1970. Stanley Werbicki of Holyoke, Massachusetts, received thirty days for the same offense. The Washington Post, Mar. 26, 1970.

123. The Washington Post, Feb. 3, 1970.

124. Defendant Ron Herrick explained that it was "a nice way of saying I'd like to see my country at peace." Judge Llewellyn Richardson said in sentencing him, "It's like waving a red flag in front of a bull." The Washington Post, July 25, 1970. The same Judge Richardson in an earlier flag desecration case said, "It does boil you up a bit when you see the flag desecrated" and "If anyone comes up before me in this manner I will impose a stiff fine and a jail sentence." The Washington Post, Feb. 22, 1970.

125. The Evening Sun (Baltimore), June 29, 1970, § C, at 28, col. 6.

126. See Attorney General of the State of Delaware's Opinion to Roger C. Mowery, Ass't Supt. Ad. Services Dept. of Public Instruction, Sept. 17, 1969, on the question "May the practice by students of raising their hands in a 'black glove salute' at public sporting events legally be restricted?" *Hodsdon v. Buckson*, 310 F. Supp. 528, 535 (1970).

127. The resolution was introduced in the Virginia legislature on February 19, 1970, by Del. James M. Thomson (D. Alexandria). No penalties other than public censure were included. The Washington Post, Feb. 20, 1970.

128. 396 U.S. 371 (1970).

129. Among other criminal vest-wearers was Edward Dietrick Franz in Richmond, Virginia (one year in jail). The Washington Post, June 19, 1969.

130. The Washington Post, Feb. 22, 1970. Cf. *People v. Pickering*, 23 N.Y.S.2d 148 (N.Y. City Magis. Ct. 1940).

131. TIME, July 6, 1970, at 9.

that *who* does the desecrating is very important. If, as is increasingly apparent, the flag has become a major medium for expression in American life, such double standards could inadvertently produce a vehicle for political prosecutions.

VI. CONCLUSION

The monolithically favorable attitude toward the flag and traditional patriotism which apparently dominated at the time when most of the present flag desecration statutes were enacted has become jaundiced. As with most institutions, the flag plays the role assigned to it by society; as at least part of American society has become more sophisticated, there has been a corresponding change in its attitude toward our national emblems. Unfortunately, the blasé attitude toward the flag evidenced by one segment of society has caused a familiar reaction by the remainder, which is apparently unweaned from its dependence on the symbol. As one journalist has written, "In the tug of war for the nation's will and soul, the flag has somehow become the symbolic rope."¹³²

The flag as "symbolic rope" has been the center of much debate within the legal community. There is an intense dispute over what the flag should stand for. There is, however, little question of what it should not stand for. It is not the symbol of partisan politics. It has never been the exclusive property of any one age group, ethnic group, or political party. To exploit it in debate over any policy or priority of this country — whether by waving it or burning it, whether within or without the present limits of statutory permission — is desecration.

One might foresee a time when the American flag resumes a more dignified position as the nation's symbol. Accordingly, flag desecration statutes will fade back into the dusty pages of the nineteenth century public laws whence they came. The use or misuse of the flag will no longer tear at the cords of the first amendment. Perhaps at that time, in an increased zeal over ecology, irate dissidents may protest government inaction in cleaning up the environment by defiling the visage of Smokey the Bear in violation of a federal law giving statutory protection to that symbol.¹³³ Prosecutions will follow. Fears of repressing first amendment guarantees will again be raised. The task and the brilliance of the Constitution will once more be summoned up: when an issue of this nature is stripped of its rhetoric, stripped of its contemporary importance and symbolic meaning, the real issue involved — the legitimate power of the state to regulate certain conduct vs. the individual's right of free expression — will again be balanced. It is this objective protection of the individual that transcends Presidents and foreign policy, the Weathermen and farm populists, democrats and federalists, and is, in a very real sense, the flag of our country.

132. *Id.* at 8.

133. 18 U.S.C. § 711 (1964).